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CRR 3729 of 2018

Mr. Chandra Sekaran & Ors.
Vs.
M/s. Uniseven Engineering &
Infrastructure Private Limited

Mr. Anirban Dutta ...for the Petitioner

Affidavit of service filed by the petitioners is taken on record. In spite of service, opposite party is not represented.

This is an application wherein the petitioners have prayed for quashing the proceedings being Complaint case no. 52404 of 2017, presently pending before learned Metropolitan Magistrate, 3rd court, Calcutta.

Petitioners are the office bearers of the company under the name and style of M/s. Hindustan Dorr-Oliver Limited, having its registered office at Mumbai and it is alleged that the petitioners have been implicated in their vicarious capacity as office bearers of the said company. They further submit that none of the petitioners are residing within the jurisdiction of the Metropolitan Magistrate Court concerned.

Petitioners contention is that the company had taken a financial loan from the Bank of India, Bandra (East) Branch, Mumbai for the purpose of expansion of its business and subsequently had defaulted in payment due to certain disputes arose between the Bank and the Company.

Due to such dispute, the company had also defaulted in payments of certain outstanding of the operational creditors. Subsequently the financial creditor of the Bank of India filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 4 of the Insolvency and Bankruptcy Rule, 2016 before the National Company Law Tribunal (NCLT) at Mumbai. Subsequent to such filing, an order dated 28th April, 2017 was passed by the said NCLT and the said order was under Section 14 of the IBC thereby fixing a moratorium and interim resolution professional (IRP) Mr. Amit Gupta, to function on behalf of and to look into the claims of the financial as well as operational creditors.

The complainant company had also filed a company petition before the Bombay High Court in the year 2016 which has been registered as company petition no. 132 of 2016. The Bombay High Court by its order dated 10th July, 2017, the company applications for winding up were adjourned sine die and all the parties including the complainant/company was given liberty to mention the matter after the NCLT at Mumbai Branch had decided the application of the financial creditor. The NCLT, Mumbai Branch had pronounced the liquidation order under Section 33 of the IBC in respect of their company namely "Hindustan Dorr-Oliver Limited" on 25th June, 2018. The said liquidation proceeding has been challenged before the National Company Law Appellate Tribunal (NCLAT) by one of the resolution applicant and the NCLAT by its order dated 29th August, 2018, has directed the liquidator not to take any steps for selling any movable or immovable assets and ensure the company remains an ongoing concern.

During pendency of the aforesaid proceeding, the instant complaint case has been filed before the learned Metropolitan

Magistrate, 3rd Court, Calcutta. It is alleged in the said complaint that as per work order dated 11th April, 2008 and amended work order dated 12th June, 2008, the complainant had provided manpower to the accused company, which was utilized for project of the accused company.

Upon raising bill of Rs. 1,77, 69,785/-, the accused disbursed the payment of Rs. 1,54,03,924/- and undertook to pay the rest amount at the earliest. However, in spite of various representations, the accused persons failed to disburse the said due amount of Rs. 23,65,834/-. In spite of demand notice, the accused persons had failed and refused to pay the said amount thereby caused wrongful loss to the complainant company.

Being aggrieved by the said proceeding, the petitioner herein contended that the NCLT fixed moratorium vide order dated 10th June, 2017 and the opposite party herein, is also a party to the said proceeding before the Hon'ble High court at Mumbai and in spite of such knowledge, the opposite party filed said complaint as a pressure tactics suppressing all material facts. He further submits that as per Section 14 of the Insolvency and Bankruptcy Act, 2016, after an order is passed under the said section, the petitioners were no more in the control and management of the said company and all bank accounts as well as day to day affairs of the said company was taken control by the resolution professional. He further submits that under Section 14 of the IBC, no proceeding or suit can lie against the company and the board of the said company remains suspended. In fact, the petitioners herein have no role as office bearers of the company after the order was passed under Section 14 of the IBC.

He further submits that suppressing all the aforesaid facts of pending proceeding and also suppressing the fact that the opposite party had participated in the insolvency as well as winding up proceeding pending in the State of Maharashtra, he has lodged the present complaint and the Magistrate has taken cognizance of the offence alleged in impugned complaint and had also issued process against the petitioners. He further submits that the petitioners have admitted that the substantial portion of the amount has already been paid and as such, there was no intention to deceive at the inception of the transaction. He further submits that in the entire complaint, no role against the petitioners as to how they are involved in the commission of alleged offence, has been depicted and in the absence of any specific averment against the petitioners in the complaint, no criminal law can be fastened against the petitioners. Accordingly, he prayed for dismissal of the criminal proceeding.

In this context, he relied upon a judgment passed in a co-ordinate Bench of this court reported in **2022 SCC Online Cal 1830 (Ranjan Sachdeva Vs. State of West Bengal and another)** and another judgment reported in **2023 SCC Online Cal 1093 (Girish Lahoti and another Vs. Firdous Alam)**.

I have considered the submissions made on behalf of the petitioners. On a bare perusal of the written complaint, it appears that the complainant has stated in paragraph 15 that in spite of reminders and request, the outstanding amount of Rs. 23,65,834/- has not been paid by the petitioners in favour of the complainant. This clearly shows that there was no initial deception on the part of the petitioners and as such, it does not constitute any offence under Section 420 of the IPC. There are also judicial pronouncement which states that there can not be simultaneous proceeding under Sections 420 and 406 of the IPC. It also appears the while lodged complaint, the petitioners have totally suppressed the fact of NCLT proceeding and the proceeding before the Hon'ble High Court at Mumbai. This suppression clearly shows mala fide on the part of the petitioners. In a series of decision, it has been well settled that the criminal court cannot be used as a money recovery agency and allegation under Sections 420 or 406 of the IPC can not be initiated only for recovery of any part payment.

It appears that may be having frustrated by the proceeding before the NCLT, the complaint has been filed as an arm twisting technique. Before the criminal Court in the instant complaint, there is no allegation as to the entrustment of any property whatsoever by the complainant to the petitioners. Hence the basic ingredients of Section 406 of IPC are not made out in the instant case. There is no specific averment in the complaint as to the role played by the petitioners in the cheating /inducement of the complainant.

The learned Metropolitan Magistrate without any application of mind issued process against the petitioners. The order of taking cognizance dated 22.8.2017 is also without due application of mind and is contrary to the provision laid down in Rule 183 of the Criminal Rules and order of the High Court, Calcutta. Learned Magistrate did not conduct an enquiry under Section 202 of the Code of Criminal Procedure by a competent person to get the actual picture to satisfy himself before issuance of process. He ought to have made himself aware that a civil claim which may be barred by the law of limitation has been given a cloak of a criminal offence. The allegation in the petition of complaint is at best a breach of contract, which is purely a civil dispute. Mere failure to keep promise, if any, by the company of the petitioners does not attract offence under Section 420 of the IPC. The alleged cheating did not take place within the jurisdiction of court below, so at least an opinion or evidence from the jurisdiction of the place of property under Section 202 of the Code, could have been brought, to know what actually happened.

Having considered the overall facts and circumstances of the case, I find that further continuance of the present proceeding will be a mere abuse of process of the court since facts and circumstances of the case leads to think that there is hardly any chance of conviction at the end of the trial.

In such view of the matter, the revisional application being CRR 3729 of 2018 is accordingly allowed.

The impugned proceeding being Complaint case no. 52404 of 2017, presently pending before the learned Metropolitan Magistrate, 3rd court, Calcutta is hereby quashed.

Urgent Photostat certified copy of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Dr. Ajoy Kumar Mukherjee, J.)